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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. ~~729~~ 46

MARGARET JOHNSON, as Administratrix of the Goods, Chattels and Credits of CHARLES JOHNSON, deceased,

Petitioner,

against

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Margaret Johnson, as administratrix of the goods, chattels and credits of Charles Johnson, deceased, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled matter.

The Opinions of the Courts Below

The opinion of the District Court is ~~not officially re~~ported (R. 159-164). The opinion of the Court of Appeals was filed on February 4, 1952 and is reported in F. 2d and printed in the Transcript of Record, pp. 171 to 175.

Jurisdiction

The action was brought under the Jones Act (46 U. S. C. 688, Appendix A), claiming damages for wrongful death.

The judgment of the Court of Appeals sought to be reviewed, was rendered on February 4, 1952. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254, subdivision (1).

Questions Presented

Was the Court of Appeals for the Second Circuit justified in holding as a matter of law that there was no causal relationship between the negligence found by it and the death of the seaman, thereby depriving petitioner of a jury trial?

Was the failure by the Court of Appeals to send the case back for a new trial in contravention of Rule 50b of the Federal Rules of Civil Procedure (Appendix C)?

Statutes Involved

The pertinent provisions are printed in Appendices A, B, C, infra, pages 18-19.

Summary Statement of the Matter Involved

This is an action for wrongful death under the Jones Act brought by the widow of a deceased merchant seaman, on behalf of herself and her two minor children.

The decedent, Charles Johnson, was a member of the crew of the Tug Boat "Transfer #10", who met his death by drowning when the vessel was negligently navigated at a railroad yard pier at Oak Point, County of Bronx, City of New York.

The case was tried in the United States Court for the Eastern District of New York before a jury, and plaintiff had a verdict, which the District Court sustained. That Court refused to set aside the jury's verdict in which it found that Johnson's death was caused by defendant's negligence (R. 163-164).

Judgment on the said verdict was entered in the office of the Clerk of said United States District Court on the 20th day of June, 1951, in favor of petitioner against the New York, New Haven and Hartford Railroad Co. in the sum of $20,183.33. The Court of Appeals for the Second Circuit reversed the judgment and directed a judgment for the defendant on February 4, 1952.

The Court of Appeals in reversing the judgment upheld the jury's findings of negligence in the operation of the tug, which consisted of pulling away from the bridge before the captain of the tug had ascertained that Johnson was in a position of safety. However, the Court held that there was not sufficient evidence of causal relationship in that Johnson's fall from the float and his subsequent death may have been due to "some other unknown cause" and directed that a verdict be entered for the defendant.

Specifications of Error to be Urged

The learned Court of Appeals for the Second Circuit erred in the following respects:

(1) In holding that there was not sufficient evidence to justify the jury's finding of causal relationship between the negligence found and the death of decedent.

(2) In substituting its own inference of proximate cause for that found by the jury and thereby depriving petitioner of a jury trial.

(3) In reversing the judgment of the District Court.

(4) In failing to send the case back for a new trial.

Reasons for Granting the Writ

(1) The decision of the Court below not only was a gross injustice, but is in direct conflict with the oft-expressed decisions of this Court in the Federal Employers' Liability Act and Jones Act cases that the question of causal relationship is peculiarly one for the jury.

Charles Johnson was a floatman employed on the defendant's tug "Transfer #10" (R. 10). He met his death by drowning on April 22, 1946, while the tug was removing two empty car floats from defendant's Oak Point Railroad Yard on the East River (R. 11-12). There were no eye-witnesses, and the decedent was found floating at the point where the floats had been secured to defendant's bridge (R. 44, 45, 46). The transcript of record opposite pages 146 and 148 shows photographs of the bridges and the two car floats involved in the accident.

The empty car floats which the tug removed from the Oak Point Yard were numbered 53 and 58. Car float 53 was secured to bridge 11 and car float 58 to bridge 12, and each one of them was lying bow in (R. 17). Each car float is 340 feet in length and 40 feet wide. Between the two bridges, 11 and 12, was a pier about 50 feet long, referred to in the testimony as the "short rack". On the outer side of the two bridges were long piers, known as "long racks". The two floats were secured to the short rack by lines called "short racklines" and to the long pier or long rack by "long racklines" (R. 17, 18, 19, 21-22). All the factual testimony was given by the captain and the mate, both of whom were still in the employ of the defendant, and both of them (particularly the captain) were charged with negligence in the operation. When the tug came alongside of float 53, the mate, Gaglio, and decedent, Johnson, stepped aboard float 53 (R. 17-18). Gaglio went towards the stern of the float, so as to secure at the stern the two floats when they were pushed together by a maneuver of the tug (R. 17-18). Johnson went towards the bow, as his duty

was to remove the short rackline on float 53, and then step across to the other bridge, where he was required to remove the short rackline on the 58, and then secure the two floats to each other, once they cleared the short rack, so that when the tug finally pulled out, the two floats would be secured at the bow by Gaglio, and at the stern by Johnson (R. 18, 20-21).

The last time that Johnson was seen alive was when he walked on the 53 towards the bow (R. 20, 25). Concededly, he did remove the short rackline on the 53. Concededly, he crossed over to bridge 12 and was on the 58 at some time before the accident (Opinion p. 175). Concededly, the captain's view of the port bow was obstructed by the short rack, so that he could not see Johnson's operation. The long racklines are normally removed by men on the bridge or on the long rack, referred to in the testimony as "bridgemen" (R. 21-22, 24, 45, 64, 67, 92).

The captain has a clear view of every other part of the float with the exception of the port bow heretofore indicated, so that if Johnson had removed the long rackline on the 58, either the mate or the captain, or both, could easily have seen him (R. 70). No one contends that he removed the long racklines.

Not having a proper view, the captain relies on a well-recognized signal from Johnson of "all gone" before pulling away from the bridge (R. 55, 65-66). Both the mate and the captain admit that while they heard someone holler "all gone", they did not know that it was Johnson, and furthermore, Captain O'Brien admits that it could have been one of the bridgemen (R. 28-29, 55-56, 71, 92). The "all gone" signal is not only used by the floatman (Johnson) but also by bridgemen (R. 45). The mate so stated on direct examination but then changed it under a highly leading question put to him by his employer's counsel (R. 45-46). The jury, of course, had a right to and did accept his first answer. The danger of proceeding ahead until the captain knew that the signal came from Johnson

was forcefully described by Captain Holmes, a tugboat operator in the Harbor of New York, of more than thirty years' experience.

Unlike the long rackline, with an eye that is thrown off by a bridgeman (R. 22-23), the short rackline is actually tied around the bitts by snake loops, or turns (R. 54), which required Johnson to unwind the line (R. 82-83). There being no eyewitnesses, no one knows of course, at what moment in the process of unwinding, the float started to pull ahead. Without actually knowing that Johnson was in a position of safety, the danger in starting to pull away from the bridge is that the man on the line may get tangled up in the line, either by getting his hands or his feet caught, and thereby fall overboard (R. 82-83).

The negligence charged was that it was the captain's duty to ascertain the author of the "all gone" signal by sending a man over to where he could have a clear view of the floatman, before starting to pull out, and that he failed to do. That was only a matter of a few feet as can be seen from the photographs (R. 146, 148). This procedure was not only customary (R. 79, 80, 81-83), but nothing novel nor unusual (*Southern Ry. Co.* v. *Hermans*, 44 F. 2d 366, 64 F. 2d 237; C. C. A. 4th Cir.).

Johnson was missed from the float, according to the mate, after the floats cleared the short rack, which means after they had pulled away from bridges 11 and 12, some 50 or 60 feet (R. 36). That Johnson had succeeded in clearing the short rackline on the 53 was conceded (R. 70) Furthermore, the Court of Appeals found that it was a fair inference that he had loosed the short rackline on the 58 because the float was pulled out without breaking it (Opin., R. 175). It was petitioner's claim that while Johnson was engaged in that operation on the 58, and before he had entirely completed clearing the line, he was caught by his line by the starting of the float, away from the bridge, thrown forward, struck his head, as was indicated by the mark on his forehead, and thrown into the water right at the point where the float was pulled away from the bridge (R. 97, 101). His body was found floating

within a distance of some 3 feet from bridge 12 (R. 45) where the 58 had been secured.

Captain O'Brien's knowledge that Johnson was not on the float, was indicated when he directed the mate to do that part of Johnson's job which required him to secure the two floats to each other by a line at the port bitts (R. 36-37). With strange cynicism the tug proceeded ahead, completed the operation of securing the floats at the Gates pier, some 500 feet away, then returned (R. 60). A search was then instituted for Johnson and his body was found floating at bridge 12. Attempts at resuscitation failed, and the death was ascribed to drowning (R. 45, 152).

The only issues submitted to the jury by the District Court were whether or not it was negligent for Captain O'Brien to pull away without ascertaining the author of the signal "all gone", and whether that negligence caused Johnson's death (R. 137-139, 162). The jury found a verdict for the plaintiff, thereby finding both these issues in favor of petitioner.

The Court of Appeals accepted the jury's finding of negligence. On the other hand, the Court decided as a matter of law that despite such negligence, the jury was not warranted in finding causal relationship, stating that it was more likely that Johnson gave the signal and then for some unknown cause fell from the float.

It is petitioner's contention that not only is the question of causal relationship peculiarly a question for the jury, but in the instant case, the Court of Appeals substituted its conjecture of what happened at the fatal moment, and was able to do so only by disregarding the testimony from which the jury had a right to and did adduce that Johnson did not give the signal, but that it was given by a bridgeman.

The Court agreed with the jury's verdict that it was a proper inference to find that Johnson was actually on the float, and that he came to his death by falling therefrom. In coming to its conclusion, that it must have been Johnson that gave the signal and not a bridgeman, the Court not

only went outside of the record, but actually disregarded the testimony. Neither the captain nor the mate said that Johnson gave the signal. In basing its conclusion that it was most likely Johnson that gave it, the lower court found comfort in the testimony to the effect that no witnesses *"observed"* any bridgemen there.

The Court's conclusion is a non sequitur. It overlooked that in operations of this kind, the men on the tug become so accustomed to the presence of people on shore, that they pay very little attention to them, and the mere fact that they did not *see* bridgemen, does not preclude the fact that they were there. Captain O'Brien specifically stated:

> "Q. Well, look, there are bridgemen there, whether you see them or not, aren't there? A. Yes" (R. 92).

Gaglio, the mate, testified that the reason he did not see any bridgemen was that he was walking in the other direction (R. 42). That the more reasonable inference is that a bridgeman gave that fatal signal is buttressed by uncontradicted testimony. O'Brien stated that he did not know whether or not the signal was given by a bridgeman (R. 64-65); that Johnson's normal duties involved removing only the short racklines and not the long racklines (R. 68)—therefore, there must have been a bridgeman present, because otherwise the floats could not have been moved away without the removal of the long racklines; that it is the duty of the bridgeman to throw off the long racklines (R. 21-22); and that it may well have been a bridgeman who shouted "all gone" (R. 92).

Furthermore, Johnson was an experienced man. He knew the danger of giving the "all gone" signal while he was still unloosening the short rackline. There is always a presumption that the deceased did not act negligently. *Tenant* v. *Peoria & P. Ry. Co.*, 321 U. S. 29, at page 34. The Court below would destroy that presumption by its unreasonable inference that Johnson deliberately or negligently put himself into a position of danger by giving the

signal before he was ready. The Court says that he may have stumbled. That is a possibility—but it was for the jury to say whether that was brought about by the negligent operation of the tug at a time when it had no right to start pulling the float away from the bridge, until the captain had learned the identity of the author of the signal.

As against that strained inference by the Court of Appeals the jury had ample evidence to support its finding of cause and effect.

It is not at all essential that the facts and circumstances should *compel* an inference of causal connection, but rather that they *permit* such an inference.

The Court of Appeals failed to give consideration on the question of causal relationship that on appeal the appellate court must consider the evidence from the strongest viewpoint of the successful party below, and give that party the advantage of every fair and reasonable intendment which the evidence could justify. All inferences that reasonably may be drawn from the evidence must be resolved in the plaintiff's favor. *Myers* v. *American Well Works* (C. C. A. 4th Cir.), 114 F. 2d 252, 253; *Nielsen* v. *Richman* (C. C. A. 8th Cir.), 114 F. 2d 343, 345; *Gunning* v. *Cooley*, 281 U. S. 90; *Tennant* v. *Peoria, etc.*, supra.

The Appellate Court is not free to set aside a jury verdict merely because the jury could have drawn different inferences or conclusions, or that the Court regards another inference as more reasonable. *McLeod* v. *Union Barge Line*, 95 F. Supp. 366.

The very argument by the Court below that it was "equally reasonable" to infer that Johnson gave the signal and not a bridgeman, answers itself. If both inferences could be adopted, then it certainly is an invasion of the jury's function by the Court adopting one of equally reasonable inferences and excluding the other. There is no justification, in reason or authority, that compelled the jury to accept the other "equally reasonable" inference that the

Court of Appeals adopted. This Court in *Wilkerson* v. *McCarthy*, 336 U. S. 53, criticized such an attempt as an "independent resolution of conflicting testimony", and in *Tennant* v. *Peoria & P. Ry. Co.*, supra, at page 35, the Supreme Court in referring to such an inference by the appellate court, said that it suffered from the same lack of direct proof as characterizes the one adopted by the jury.

It is axiomatic that in death cases, where there are no eyewitnesses, there is great difficulty in proving cause and effect. The Courts have taken a realistic view of that difficulty, and have uniformly held that the perplexing problem of causal relationship may be properly found by a jury from known facts, even if such deductions may involve speculation and conjecture.

In *Lavender* v. *Kurn*, 327 U. S. 645, the Supreme Court of Missouri had reversed a jury verdict for the plaintiff, holding that it was mere speculation and conjecture to say that deceased was struck by a mail hook, and that the plaintiff had failed to offer proof to warrant the inference of causal connection (354 Mo. 196). This Court reversed and held that such holding was "an undue invasion of the jury's historic function", and that all jury verdicts necessarily involve speculation and conjecture.

In *Tiller, Ex.* v. *Atlantic Coast Line R. Co.*, 318 U. S. 645, the defendant had urged that cause of death was speculative and conjectural. A motion for a directed verdict for the defendant was granted and affirmed by the Circuit Court of Appeals (128 F. 2d 420). That Court had held that the deceased, in putting himself in a position of danger, during a switching operation, negated the conclusion of negligence. This Court held that the jury should be permitted to weigh the evidence of negligence, contributory negligence and the comparative rule, and thereby "do justice to all concerned" (p. 65).

In *Tennant, Adm'x* v. *Peoria & Pekin Union Ry. Co.*, supra, the plaintiff had a verdict. The Circuit Court of Appeals for the Seventh Circuit reversed (134 F. 2d 860)

holding, as in the instant case, that there was no substantial proof that the negligence of the railroad was the proximate cause of Tennant's death, and directed a verdict for the defendant. This Court granted certiorari "because of the important problem as to petitioner's right to a jury determination of the issue of causation". There also, there were no eyewitnesses. This Court in reversing, reiterated fundamental principles that are peculiarly pertinent to the instant case. The Court held that there is a presumption that the deceased was actually engaged in the performance of his duties and exercised due care for his own safety at the time of his death (p. 34). The Court below found other inferences inconsistent with the jury verdict. This Court said that these inferences "suffer from the same lack of direct proof as characterizes the one adopted by the jury" (p. 35). In the instant case, there was direct proof that a bridgeman may well have issued the important signal, particularly in view of the fact that there was no proof that Johnson did.

In *Pollard* v. *Seas Shipping Co., Inc.* (C. C. A. 2d), 146 F. 2d 875, Circuit Judge Clark held that in actions under the Jones Act the right to jury trial should not be invaded. The mere fact that the case was close on the issue of negligence as a proximate cause of death did not justify either the District Court or the appellate court in usurping the functions of the jury. Similarly in the case of *Sadler* v. *Pennsylvania Railroad Co.*, 159 F. 2d 784, where there were no eyewitnesses, and the seaman fell to his death between two barges, the Circuit Court of Appeals of the Fourth Circuit, by Circuit Judge Parker, held that it is for the jury to draw any inferences that could be reasonably drawn and that it is elementary that proximate cause need not be established by direct evidence.

Bearing in mind that Johnson's body was found only 3 feet away from where the float had been secured to the bridge, and in view of the Court of Appeal's finding that he fell from that float, it becomes clear that that is the

point where the negligence occurred. The only reasonable conclusion then is that that negligence was the cause of death. *Johnson* v. *Griffiths S. S. Co.*, 150 F. 2d 224, at page 226. The very essence of the jury's function is to select from among conflicting inferences and conclusions that which it considers the most reasonable. *Tennant* v. *Peoria & P. Ry. Co.*, supra, at page 35. Nor can any contributory negligence on Johnson's part negate the inference that his death was due to respondent's negligence. *Tennant* v. *Peoria & P. Ry. Co.*, supra, at page 35. The lower Court's finding is a finding of negligence in a vacuum. The jury, on the other hand, did not act in a vacuum. In view of the fact that there is a presumption that the deceased was not guilty of contributory negligence; that he was actually on the float at the time; that the float pulled away when the captain did not know whether it was the floatman that gave the signal authorizing him to pull away; that his body was found right at the bridge to which the float had been secured, it certainly was not a strained inference on the part of the jury to find that the negligent pulling away caused Johnson's death.

Of course there was no certainty to this. Litigated issues are seldom established to a certainty. Generally, the quest for certainty is vain and futile, or, as stated by Judge Cardozo, the law contents itself with probabilities and declines to wait for certainty before drawing its conclusions. *Lewis* v. *Ocean Accident and G. Corp.*, 224 N. Y. 18, 21-22.

That the float was pulled away from the bridge negligently, is a circumstance found by everybody. The inferences to be drawn from that circumstance need not be certain or incontrovertible. Different minds may well come to different conclusions. That is why it is for the jury to decide and not the Court. *Hart* v. *Hudson River Bridge Co.*, 80 N. Y. 622. It is equally well established that proof of defendant's negligence does not mean that plaintiff's evidence must exclude or eliminate every other possible cause or point out the particular act or omission which

caused the injury. *Rosenberg* v. *Schwartz*, 260 N. Y. 162, 166; *White* v. *Lehigh Valley R. R. Co.*, 220 N. Y. 131; *Ingersol* v. *Liberty Bank*, 278 N. Y. 1.

(2) The Court of Appeals failed to give due weight to the declared policy of this Court that in cases under the Federal Employers' Liability Act and Jones Act the right of trial by jury should be particularly guarded.

Congress, in the Jones Act (46 U. S. C. Sec. 688), adopted the same standard of care as was provided for under the Federal Employers' Liability Act (Appendices A and B). That act specifically provides that the carrier shall be liable if the negligence "in whole or in part" contributed to the injury or death. The right of trial by jury should be just as zealously guarded in actions by seamen under the Jones Act as it is in the F. E. L. A. cases. If anything, by virtue of the nature of their work, it should be more so. It was pointed out by this Court that the Jones Act enlarged the remedies heretofore available to seamen. *Panama Railroad* v. *Johnson*, 264 U. S. 375; *Garrett* v. *Moore-McCormack*, 317 U. S. 239.

There have been many cases here, where this Court announced again and again its declared policy in F. E. L. A. cases. Succinctly stated, it has been said that to deprive railroad workers of the benefit of a jury trial in close or doubtful cases, is to take away a goodly portion of the relief which Congress has afforded them. *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350; *Blair* v. *Baltimore & Ohio R. R.*, supra; *Wilkerson* v. *McCarthy*, supra.

This Court even overruled a long-established doctrine in preserving a seaman's right to a jury trial. *Jacob* v. *New York City*, 315 U. S. 752. It was the so-called "simple tool doctrine" under which the Courts have exonerated employers from liability in the furnishing of tools that were simple, upon the theory that the employee has as much, if not greater opportunity, in discovering defects. This Court refused to apply that doctrine to seamen.

In its effort to preserve the jury trial, the Supreme Court in a case not involving death, held that the question of causal connection was one for the jury, and overruled the holding of the Court of Appeals for the Fifth Circuit (170 F. 2d 719). That was in the case of *Carter* v. *Atlanta, etc., Ry. Co.*, 338 U. S. 430. The Court held that if the injury to the railway employee resulted "in whole or in part" from defendant's negligence or its violation of the Safety Appliance Act, then it is a question for the jury to determine as to whether causal relationship existed. In *Corey* v. *Southern Pacific R. Co.*, 335 U. S. 520, the Court held that the jury may determine whether the negligent breach is "a contributory proximate cause".

Here, the lower Court invaded the jury's exclusive function. Congress has chosen the jury as the proper tribunal to assess and evaluate the facts. *Bailey* v. *Central Vermont Ry. Co.*, supra, at page 354, and *Berry* v. *U. S.*, 312 U. S. 450.

By substituting its findings for that of the jury, the lower Court not only deprived Johnson's widow and two children of the benefit of the verdict awarded to them, but the Court of Appeals' decision, if permitted to stand, will lead to great confusion on the question of causal relationship in seamen's death cases where there are no eye witnesses. Time and again fatal accidents occur without the presence of witnesses. There are many cases such as *Casey* v. *American Export Lines*, 173 F. 2d 324; *Pollard* v. *Seas Shipping Co., Inc.*, supra; *Larsen* v. *U. S.*, 72 F. Supp. 137 and *Johnson* v. *Griffiths S.S. Co.*, supra, where causal connection was based entirely upon inference. Many of these accidents in which claims are prosecuted, are never officially reported. The decision of the lower Court will tend to undermine the forward steps of liberal construction of this Court in *Jones Act* and *F. E. L. A.* cases.

(3) The Court of Appeals erred in failing to order a new trial under Rule 50b of the Federal Rules of Civil Procedure, in contravention of this Court's interpretation.

The defendant, at the trial, took the following procedural steps: At the end of the plaintiff's case it moved to dismiss, and decision on that motion was reserved by the District Court (R. 102, 105). At the end of the entire case it renewed the motion to dismiss and also asked that the Court direct a verdict in its favor upon two grounds and only those.

1. That there was no proof of negligence, and
2. That the deceased himself was responsible for his own death.

Again, decision was reserved (R. 133, 134). The jury returned a verdict in favor of the plaintiff, and the defendant then moved to set aside the verdict "on the ground that it is contrary to the law and contrary to the evidence and contrary to the weight of the evidence and excessive". The Court decided the question of excessiveness by overruling it, but again reserved decision on the motion (R. 145).

Rule 50b (Appendix C, infra, p. 19) specifically states that "Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict." No such motion was ever made.

Nevertheless, the Court of Appeals in its mandate ordered the District Court to direct a verdict for the defendant.

This Court dealt with Rule 50b in the following oft-quoted cases:

In *Halliday* v. *U. S.*, 315 U. S. 94, the defendant moved for a new trial, but failed to move for judgment n. o. v. The motion was denied. On appeal, the Court of Appeals rendered final judgment for the defendant. The Supreme

Court reversed, holding that there was sufficient evidence to support the verdict, but did not reach the problem of the failure of the defendant to move for judgment under Rule 50b. In *Conway* v. *O'Brien*, 312 U. S. 450, the defendant had moved for a directed verdict at the close of the evidence, but failed to move for judgment under Rule 50b. Nevertheless, the Circuit Court of Appeals, Second Circuit (111 F. 2d 611), reversed and ordered the complaint dismissed. This Court granted certiorari, but again did not rule on the question of procedure, but reversed solely on the ground that the Trial Judge had properly submitted the case to the jury.

In *Berry* v. *U. S.*, 312 U. S. 450, there was again raised the question whether a motion for judgment n. o. v. was necessary to enable the appellate court to dismiss rather than remand for a new trial. But here again this Court failed to reach the question because it found that the judgment of dismissal by the Court of Appeals should be reversed because there was sufficient evidence for the jury, and to sustain the judgment for the plaintiff.

This Court finally reached the question squarely in *Cone* v. *West Virginia Pulp and Paper Co.*, 330 U. S. 212. In that case, as in the instant case, the defendant failed to move for a judgment, notwithstanding the verdict, and the Court held that the respondent, having failed to submit such a motion, the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.

Upon the authority of that case, this Court made a similar decision in *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571, where both parties had moved for a directed verdict, but the losing party had failed to move for a judgment under the rule.

In the case of *Garman* v. *Metropolitan Life Insurance Co.* (U. S. Court of Appeals, Third Cir., 1949), 175 F. 2d 24, the Court of Appeals found that the motion for a directed verdict for the defendant, made at the conclusion of the entire case, should have been granted, but because

of the failure to make such a motion after judgment, the Court felt constrained to remand the case back to the District Court for a new trial.

In the instant case, the failure to order a new trial is not at all of academic interest to the petitioner. In the trial of the case, there were two additional issues urged in the District Court, but both of them were overruled by that Court and not submitted to the jury. One was the question as to whether or not the defendant was negligent in failing to attempt to rescue Johnson after they found he was missing (R. 29-30, 83-85). A proper exception was taken to such refusal to submit that issue to the jury (R. 133-134). Furthermore, the District Court failed to permit evidence which would have indicated that the car float 53 upon which Johnson and the mate had stepped, was covered with oil (R. 38). That factor may well have been a contributing cause to his death. We believe that the District Court improperly held that that issue was not sufficiently pleaded in view of the allegations in the complaint that the defendant failed to furnish Johnson with a safe place in which to work (R. 5, 38). Failure to order a new trial, in any event, was a real deprivation of the rights of the petitioner. Nevertheless, we earnestly urge and suggest that this Court review particularly the issue as to whether or not the lower Court did deprive petitioner of a jury trial on the issue of causation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should exercise its right of review and grant this petition for a writ of certiorari.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX A

Section 688 of The Jones Act provides:

"§ 688. *Recovery for injury to or death of seaman.*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007."

APPENDIX B

Section 51 of the Federal Employer's Liability Act provides:

"§ 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of

the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or *death resulting in whole or in part from the negligence* of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404." (Emphasis ours.)

APPENDIX C

The Federal Rules of Civil Procedure Provide in Rule 50 (b):

"Rule 50.(b). *Reservation of Decision on Motion.*

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."